

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BOBBY MOSS,)
)
Plaintiff,) 4:09CV3101
)
v.)
)
TECUMSEH PRISON,) MEMORANDUM OPINION
)
Defendant.)
_____)

Plaintiff filed his complaint on May 15, 2009, and was given leave to proceed in forma pauperis on June 17, 2009 (Filing Nos. [1](#) and [10](#)). The Court now conducts an initial review of the complaint to determine whether summary dismissal is appropriate under [28 U.S.C. §§ 1915\(e\)](#) and [1915A](#).

I. SUMMARY OF COMPLAINT

Plaintiff filed his complaint on May 15, 2009, against Tecumseh State Prison ("TSP") (Filing No. [1](#) at CM/ECF p. 1). Plaintiff is currently incarcerated at TSP in Tecumseh, Nebraska. ([Id.](#))

Plaintiff, an African American, alleges that TSP has kept plaintiff in administrative segregation longer than a similarly situated white inmate. ([Id.](#) at CM/ECF pp. 1-2.) Specifically, plaintiff alleges that he was involved in a fight with a white inmate. ([Id.](#)) Because of this fight, plaintiff has been confined in administrative segregation for a year, while the white inmate was only confined in administrative segregation for

three days. (*Id.*) Plaintiff also alleges that he "ha[s] no access to the law library." (*Id.* at CM/ECF p. 2.) Plaintiff seeks monetary damages in the amount of \$2,500.00. (*Id.*) Plaintiff also seeks injunctive relief in the form of a court order that directs defendant to transfer plaintiff "out of Tecumseh State Prison." (*Id.*)

II. APPLICABLE LEGAL STANDARDS ON INITIAL REVIEW

The Court is required to review prisoner and in forma pauperis complaints seeking relief against a governmental entity or an officer or employee of a governmental entity to determine whether summary dismissal is appropriate. See 28 U.S.C. §§ 1915(e) and 1915A. The Court must dismiss a complaint or any portion thereof that states a frivolous or malicious claim, that fails to state a claim upon which relief may be granted, or that seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e) (2) (B); 28 U.S.C. § 1915A.

Therefore, where a pro se plaintiff does not set forth enough factual allegations to "nudge[] their claims across the line from conceivable to plausible, their complaint must be dismissed" for failing to state a claim upon which relief can be granted. Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1974 (2007) (overruling Conley v. Gibson, 355 U.S. 41 (1967), and setting new standard for failure to state a claim upon which relief may be granted). Regardless of whether a plaintiff is

represented or is appearing pro se, the plaintiff's complaint must allege specific facts sufficient to state a claim. See Martin v. Sargent, 780 F.2d 1334, 1337 (8th Cir. 1985). However, a pro se plaintiff's allegations must be construed liberally. Burke v. North Dakota Dep't of Corr. & Rehab., 294 F.3d 1043, 1043-44 (8th Cir. 2002) (citations omitted).

Liberally construed, plaintiff here alleges federal constitutional claims. To state a claim under 42 U.S.C. § 1983, a plaintiff must allege a violation of rights protected by the United States Constitution or created by federal statute and also must show that the alleged deprivation was caused by conduct of a person acting under color of state law. West v. Atkins, 487 U.S. 42, 48 (1988); Buckley v. Barlow, 997 F.2d 494, 495 (8th Cir. 1993).

III. DISCUSSION OF CLAIMS

The Eleventh Amendment protects states and state agencies from suit by private citizens. Doe v. Nebraska, 345 F.3d 593, 597 (8th Cir. 2003). However, Eleventh Amendment immunity is not absolute. Id. The Supreme Court has recognized that Congress may override a state's sovereign immunity or a state may waive its immunity by consenting to suit. Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 670 (1999). In addition, under the doctrine of Ex Parte Young, 209 U.S. 123 (1908), private citizens can bring suit

against a state official for prospective injunctive relief without violating the Eleventh Amendment. Heartland Acad. Cmty. Church v. Waddle, 427 F.3d 525, 530 (8th Cir. 2005).

Here, plaintiff only sues Tecumseh Prison, a state agency. (Filing No. 1 at CM/ECF p. 1.) There is no indication that Congress has overridden the state's immunity or that the state waived its immunity in this matter. In addition, the *Ex Parte Young* doctrine does not extend to states or state agencies. See Pediatric Specialty Care, Inc. v. Ark. Dep't of Human Servs., 443 F.3d 1005, 1017 (8th Cir. 2006) (recognizing that only state officials, as opposed to state agencies, can be sued for prospective injunctive relief and dismissing claims against state agency), vacated on other grounds, 127 S.Ct. 3000 (2007); see also Kentucky v. Graham, 473 U.S. 159, 167 n.14 (1985); Alabama v. Pugh, 438 U.S. 781, 781-82 (1978). Accordingly, defendant is entitled to sovereign immunity and plaintiff's complaint must be dismissed. A separate order will be entered in accordance with this memorandum opinion.

DATED this 29th day of June, 2009.

BY THE COURT:

/s/ Lyle E. Strom

LYLE E. STROM, Senior Judge
United States District Court